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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 717

JOHN S. GORSUCH, *Petitioner*

v.

PROVIDENT SECURITY LIFE INSURANCE COMPANY,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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The judgment of the district court herein was an integral part of the equitable relief granted by the same court and the same judge in *John S. Gorsuch and Albert J. Doig* v. *DePinto*, October Term, 1963, No.

709, Supreme Court of the United States.[1] In the latter case, District Judge George H. Boldt ordered that the $314,794.19 taken from United on October 18, 1957 by American, Francis I. Sabo, Edwin B. Pegram, Hjalmar B. Landoe, and others, due to the gross negligence of Angus J. DePinto and Elmer W. Duhame, be repaid. And having restored United's property and solvency by such order, District Judge Boldt, in this action, completed the task by giving back to United its corporate life which had also been taken from it by American and the others named above. He did so by declaring null and void the "merger"[2] which had been effected and brought about by the defendants in

[1] Petitioner first attacked the validity of the merger in March of 1959 when in *Gorsuch* v. *United* (cited on appeal as *Nicz* v. *Gorsuch*, 295 F. 2d 909) Sabo, Pegram, Landoe, DePinto, Duhame, and American sought dismissal of that action on the ground that United had been merged into Provident. However, the court of appeals ruled in October of 1961 in *Nicz* v. *Gorsuch*, 295 F. 2d 909, that Gorsuch was estopped from so attacking the merger therein and must do so in a direct action. This action then followed.

[2] Paragraph 6 of the merger agreement states that United shareholders received 1 share of Provident stock for each 30 shares of United stock plus a Participating Unit in United. Since the United shareholders had paid $150 for these 30 shares and the Participating Unit and the Provident stock, according to the merger agreement, was worth $1.70 per share, the "merger" effected by American, Sabo, Duhame, Pegram, and Landoe gave the United shareholders $1.70 for each $150 invested. Provident in exchange for $4,080 of its stock (61,200.11 shares divided by 30 equals 2,400 times $1.70 or $4,080) received about $29,000,000 in life insurance and annuities in force. Valued conservatively at $20 per $1,000, Provident obtained, as a result of the 38,799.89 shares of United Stock "voted" by American, seasoned life insurance worth $600,000 for $4,080, while at the same time limiting its assumption of liabilities of United. (R. 14, 16, 17-19). During oral argument below Provident refused to state that it assumed all of the liabilities of United as required by Arizona statute.

Gorsuch v. *DePinto*, *supra*, American, Sabo, Pegram, Landoe, Duhame, and others. Thus, Respondent is correct, in suggesting at page 4 of its brief, that the instant action is related to *Gorsuch* v. *DePinto*, *supra*.

Because of this relationship, and the issues raised in the Petition,[3] the Court should either grant review now or defer its decision until it decides whether to review the court of appeals' decision in *Gorsuch* v. *DePinto*, *supra*, as to whether the parties in a stockholder's derivative action are entitled to a Seventh Amendment jury trial and whether Rule 50 (b) forbids a judgment n.o.v. in excess of a jury verdict. The reason is that if the Court should review *Gorsuch* v. *DePinto*, *supra*, and subsequently reverse the court of appeals, an extremely important aspect of the relief sought for United will have been foreclosed should the Court deny the Petition here at this time.[4]

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[3] Respondent's brief in opposition contains so many unsupported and erroneous mixed "factual" and "legal" propositions that a 30 or 40 page reply would be required. It is significant, however, that it did not respond to the several challenges to the rationale of the court of appeals' opinion, preferring instead to make factual and legal contentions without the citation of authority. Typical of these is the claim that Arizona's Director of Insurance "approved" the merger. He did not. All he approved was the merger *agreement* which was submitted to him before the vote occurred. Nothing in the record shows that he knew that American, Sabo, Pegram, Landoe, and others had taken $314,794.19 of United's assets to "pay" for the United stock (38,799.89 shares) which they purported to vote in favor of the merger after they had been sued for the return of the $314,794.19.

[4] Respondent's statement that Petitioner may proceed with a trial on the merits is beside the point since the court of appeals, in its decision here, has foreclosed the four bases of attack on the validity of the merger brought about with the 38,799.89 shares of United stock "paid for" by American, Sabo, Pegram, and Landoe.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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with the $314,794.19 of United's cash, bonds, and mortgages. (That President was aware of the illegality of the 38,799.89 shares of United stock held by American is shown in paragraph 8 (e) of the merger agreement which requires the cancellation of these shares without consideration to American. In short, President relies on the subsequent votes of these same 38,799.89 shares to validate the merger)... (R. 18).